

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

CHRISTOPHER C. JOHNSON,)	Case No.: 3:24-cv-05071-TMC
)	
Plaintiff,)	DEFENDANT, AMSHER COLLECTION
)	SERVICES, INC.’s OPPOSITION TO
vs.)	PLAINTIFF’S MOTION TO STRIKE
)	AFFIRMATIVE DEFENSES
AMSHER COLLECTION SERVICES,)	
INC.;)	Judge Tiffany Cartwright
)	
Defendants.)	

Defendant AmSher Collection Services, Inc. (“AmSher”), through counsel and pursuant to Fed. R. Civ. P. 12(f), submits this memorandum of law in opposition to the Motion to Strike Affirmative Defenses (“Motion to Strike”) filed by pro se plaintiff, Christopher C. Johnson (“plaintiff”).

INTRODUCTION

Plaintiff asserts claims under the Fair Credit Reporting Act (“FCRA”) and the tort of Intrusion upon Seclusion based on single pertinent allegation, namely, that on or

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1 about January 2, 2020, AmSher accessed his credit report without a “permissible
2 purpose” under the FCRA.

3
4 AmSher timely answered the Complaint and asserted six affirmative defenses.
5 Plaintiff asserts AmSher’s fourth, fifth, and sixth defenses are “unfounded, immaterial,
6 and, in part, scandalous, failing to present a legitimate legal or factual basis under the
7 circumstances of this case.” AmSher herein formally withdraws its fifth affirmative
8 defense, which it believed to be accurate at the time of filing its Answer.
9

10 As to AmSher’s fourth and sixth affirmative defenses, the Court should deny
11 plaintiff’s Motion to Strike because the defenses are applicable to plaintiff’s claims and
12 satisfy the “fair notice” standard set out by the Ninth Circuit Court of Appeals; and, in
13 any event, plaintiff cannot demonstrate any unfair prejudice resulting from the defenses.
14

15 For these reasons, and as further explained below, the Court should deny
16 plaintiff’s Motion to Strike.
17

18 **PROCEDURAL BACKGROUND**

19
20 On January 25, 2024, plaintiff filed his Complaint. Doc. 1. On January 26, 2024,
21 the Court entered an Initial Scheduling Order. Doc. 6. On February 21, AmSher filed its
22 Answer and Affirmative Defenses to the Complaint. Doc. 10.

23 On February 22, 2024, plaintiff filed his Motion to Strike. Doc. 11. On February
24 27, 2024, the noting date for the Motion was reset to March 15, 2024.
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27

LAW AND ARGUMENT

Federal Rule of Civil Procedure 12(f) provides that “[t]he court may strike from a pleading any insufficient defense[.]” Fed. R. Civ. P. 12(f). While a court generally has broad discretion when considering a motion to strike, striking a defense from a pleading is “generally disfavored because the motion[] may be used as [a] delay tactic[] and because of the strong policy favoring resolution on the merits.” *White v. University of Washington*, 2023 WL 3582395, *2 (W.D. Wash. May 22, 2023) (citing *Chao Chen v. Geo Grp., Inc.*, 297 F. Supp. 3d 1130 (W.D. Wash. 2018); see *Reed v. Avis Budget Grp.*, 2009 WL 1299122, *1 (N.D. Cal. May 11, 2009) (noting motions to strike “constitute a drastic remedy”).

Fed R. Civ. P. 8 governs the pleading of affirmative defenses: “[i]n responding to a pleading, a party must affirmatively state any avoidance or affirmative defense....” Fed. R. Civ. P. 8(c)(1) (listing examples of affirmative defenses). Further, Rule 8(b) requires the defendant “to state in short and plain terms its defenses to each claim asserted against it.” Fed. R. Civ. P. 8(b).

The Ninth Circuit has affirmed that the “fair notice” standard applies to pleading affirmative defenses, which “only requires describing the defense in ‘general terms.’” *Kohler v. Flava Enterprises, Inc.*, 779 F.3d 1016, 1019 (9th Cir. 2015) (quoting 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1274 (3d ed. 1998)); *Simmons v. Navajo Cnty., Ariz.*, 609 F.3d 1011, 1023 (9th Cir. 2010),

1 *overruled on other grounds by Castro v. County of Los Angeles*, 833 F.3d 1060 (9th Cir.
2 2016).

3
4 The bar for deeming an affirmative defense “insufficient” and subject to being
5 struck under Rule 12 is high: the plaintiff must show that “there are no questions of fact,
6 that any questions of law are clear and not in dispute, and that under no set of
7 circumstances could the defense succeed.” *Kerzman v. NCH Corp.*, 2007 WL 765202,
8 *7 (W.D. Wash. Mar. 9, 2007) (*quoting Cal. Dep’t of Toxic Substances Control v. Alco*
9 *Pac., Inc.*, 217 F.Supp.2d 1028 (C.D. Cal. 2002)); *see White*, 2023 WL 3582395 at *7
10 (denying motion to strike as to affirmative defenses of contributory fault and mitigation
11 of damages). Further, even where a defense is technically deficient, a motion to strike
12 should be denied when the movant fails “to show they will suffer any prejudice if the
13 defenses are left in the defendant’s Answer.” *Murphy v. Trader Joe’s*, 2017 WL 235193,
14 *4 (N.D. Cal. Jan. 19, 2017) (*quoting Harris v. Chipotle Mexican Grill, Inc.*, 303 F.R.D.
15 625 (E.D. Cal. 2014)).
16
17
18

19 Here, the affirmative defenses pled by AmSher provided plaintiff with fair notice
20 and plaintiff has not demonstrated he will suffer any prejudice by the Court’s refusing to
21 strike the defenses.
22

23 FOURTH AFFIRMATIVE DEFENSE: Assuming plaintiff suffered any
24 damages, he has failed to mitigate his damages or take other reasonable
25 steps to avoid or reduce his damages.

26 Mitigation of damages is an affirmative defense. *999 v. C.I.T. Corp.*, 776 F.2d
27 866, 870 n.2 (9th Cir. 1985) (noting affirmative defense of mitigation of damages); *see*

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1 *White*, 2023 WL 3582395 at *7 (denying motion to strike mitigation defense). Failure to
2 plead the affirmative defense of mitigation of damages in the answer waives the defense.
3
4 *Holscher v. Olson*, 2008 WL 2645484, *3 (E.D. Wash. June 30, 2008).

5 Plaintiff asserts he suffered damages caused by AmSher's accessing his credit
6 report. AmSher disputes that plaintiff can establish that he suffered any legally-
7 cognizable damages as a result of AmSher's conduct. However, in the event plaintiff can
8 establishe he suffered any damages, AmSher's fourth affirmative defense gives notice
9 that AmSher will defend that plaintiff failed to take reasonable steps to avoid or reduce
10 his damages. AmSher must assert the affirmative defense to preserve it and has properly
11 provided plaintiff notice of the defense under Rule 8(c). AmSher's asserting the defense
12 does not require plaintiff to unreasonably engage in excess discovery, because any
13 evidence regarding plaintiff's actual damages would be largely within his control and his
14 burden to prove.
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17

18 FIFTH AFFIRMATIVE DEFENSE: Plaintiff lacks standing and/or should
19 be collaterally estopped from asserting one or more claims because he
20 failed to adequately disclose them in a prior bankruptcy.

21 Counsel for AmSher believed this defense to be accurate at the time AmSher filed
22 its Answer. AmSher withdraws the defense. In the event the Court does not deem the
23 defense withdrawn, AmSher moves for leave to file an amended Answer omitting the
24 defense.
25

26 SIXTH AFFIRMATIVE DEFENSE: One or more of plaintiff's claims is
27 barred by the applicable statute of limitations.

Statute of limitations is an affirmative defense. Fed. R. Civ. P. 8(c)(1). Moreover, contrary to plaintiff's contention, his FCRA claim is governed by a two-year statute of limitations. *See* 15 U.S.C. § 1681p. 15 U.S.C. § 1681p provides that a consumer must file their FCRA action within the earlier of "(1) 2 years after the date of discovery by the plaintiff of the violation that is the basis for such liability; or (2) 5 years after the date on which the violation that is the basis for such liability occurs." *Id.* Failure to file within two years of discovery of the violation is grounds for dismissal. *See Simmons v. TransUnion, LLC*, 2024 WL 249392 (D. Md. Jan. 23, 2024) (holding claims premised on wrongdoing more than two years before filing of Complaint were time-barred).

Here, plaintiff's claims are based on the allegation that AmSher "accessed Plaintiff's consumer report on or about 1/02/2020." Complaint at ¶ 30. Suit was filed on January 25, 2024—more than four years after the alleged violation. AmSher's assertion of the affirmative defense of statute of limitations is clearly supported by the factual allegations in the pleadings, and fairly puts plaintiff on notice of the defense.

CONCLUSION

For the foregoing reasons, AmSher requests the Court deny plaintiff's Motion to Strike Affirmative Defenses; grant AmSher leave to file an amended answer omitting its fifth affirmative defense, which is hereby waived and withdrawn; and award AmSher any additional relief as the Court deems proper.

Dated: March 13, 2024

/s/ Nicolas M. Bell
Nicolas M. Bell, Esq.

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